

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN TODD ALEXANDER,

Defendant-Appellant.

UNPUBLISHED

May 24, 2002

No. 230569

Oakland Circuit Court

LC No. 98-159649-FC

Before: Murphy, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right, following a bench trial, from his convictions of three counts of armed robbery, MCL 750.529, two counts of felonious assault, MCL 750.82, and five counts of possession of a firearm during the commission of a felony, MCL 750.227b.¹ Defendant was sentenced as a fourth habitual offender, MCL 769.12, to twenty to fifty years' imprisonment on the armed robbery convictions, ten to fifteen years' imprisonment on the felonious assault convictions, and two years' imprisonment on the felony-firearm convictions. We affirm.

I. BASIC FACTS

On April 19, 1998, defendant hid in an IGA grocery store until after the store closed. Defendant was armed with a revolver and had donned a ski mask when he was observed by a female employee who screamed on seeing defendant. Defendant then forced the female employee at gunpoint to a back cash office, where there were two other female employees, and defendant demanded that they turn over all the money in the office. One of the employees placed the money in her book bag and turned it over to defendant. Defendant then forced the three employees at gunpoint to enter another office where the store safe was located. Defendant removed everything from the safe, and he then went to leave through a backdoor of the store.

Unbeknownst to defendant, a police officer who was patrolling the store for IGA because of a previous armed robbery heard the employee's scream and saw defendant, although it appears that defendant did not see the officer. The officer called dispatch and reported an armed robbery in progress. The officer in the store stayed back in order to avoid a hostage situation.

¹ Defendant was found guilty but mentally ill on all counts.

When defendant attempted to leave the store via the backdoor, two other police officers were waiting outside. Defendant pointed his firearm at the officers after they had identified themselves. The two officers emptied a total of thirteen rounds at defendant as he attempted to flee the scene. Defendant did not fire at the officers. Defendant was struck by a bullet and went down shortly after attempting to run away, and in the process defendant threw his gun away. Defendant suffered three gunshot wounds, one each to his right upper thigh, left upper thigh, and left heel. The police unmasked defendant and took him to the hospital. At the scene, the police recovered defendant's firearm, which was cocked and fully loaded with six bullets. The police also recovered a bag that contained \$26,436 in cash. Additionally, store video cameras showed defendant entering the store without a mask before the robbery.

II. PROCEDURAL HISTORY

On May 6, 1998, defendant waived his right to a preliminary examination in the district court, and he was bound over on three counts of armed robbery, two counts of felonious assault, and five counts of felony-firearm, which constituted all of the charges pursued by the prosecution. The district court set a cash bond of \$1,000,000, which was not posted.

On May 28, 1998, defendant was arraigned in the circuit court. Defendant subsequently filed a notice of intention to assert the defense of insanity. On September 18, 1998, the trial court entered two orders directing that defendant be examined at the Forensic Center for the purposes of determining defendant's competency and his criminal responsibility. The Forensic Center opined that defendant was competent to stand trial and could be held criminally responsible. On January 28, 1999, a competency hearing was conducted, and defendant was deemed competent to stand trial. Defendant then requested funds for an independent psychiatric examination on the issue of criminal responsibility. On February 25, 1999, an order was filed granting defendant's request for the funds. We note that the independent examination also resulted in a conclusion that defendant could be held criminally responsible.

On April 26, 1999, there was a substitution of defense counsel based on philosophical differences between counsel and defendant. Trial had been set for May 17, 1999; however, pursuant to a stipulation and order, the trial was adjourned because defendant's new attorney needed more time to prepare for trial. On June 23, 1999, defendant moved to have the case remanded to the district court for a preliminary examination, and on June 30, 1999, the trial court granted the motion.

On November 19, 1999, a second order remanding the case to the district court for a preliminary examination was entered because no such action had yet taken place. On January 20, 2000, a preliminary examination was conducted in the district court, and the court once again bound defendant over to the circuit court on all of the charges.

On April 17, 2000, the scheduled trial was adjourned because of a court conflict; however, the trial court did address some matters. The trial court denied defendant's request to have new counsel appointed based on defendant's claim that his present counsel was not prepared. Defense counsel denied not being prepared, and he indicated that it was a difficult

defense because there was no evidence indicating that defendant was legally insane; therefore, the only argument left for acquittal was reasonable doubt. Defendant also claimed, without assistance of counsel, that he had been denied his right to a speedy trial in light of the two years that had passed since the crime. The trial court did not make any ruling on the matter.

After two days of the bench trial on April 20 and 21, 2000, the prosecutor rested after presenting numerous witnesses concerning the robbery. Defendant sought and received an adjournment to present his case on the claim that there were witnesses that needed to be located and subpoenaed.

On July 28, 2000, the trial continued and concluded with defendant submitting, per stipulation, letters from two psychiatrists indicating that defendant suffered from bi-polar disorder, but that he was not legally insane. No other evidence was presented, and the trial court found defendant guilty but mentally ill on all charges.

On September 13, 2000, the trial court heard various post-trial motions brought by defendant, pro se, including an argument that he was denied his right to a speedy trial; however, the trial court rejected the claim, along with the remainder of defendant's arguments.

On September 20, 2000, a sentencing hearing was held with the probation department and the prosecutor recommending twenty-five to fifty years' imprisonment on the armed robbery convictions, ten to fifteen years' imprisonment on the felonious assault convictions, and two years' imprisonment on the felony-firearm convictions. The trial court followed the recommendations, except that the court sentenced defendant to twenty to fifty years' imprisonment on the armed robbery convictions. The sentencing guidelines indicated a minimum sentence range of ten to twenty-five years' imprisonment on the armed robbery convictions; however, defendant was sentenced as a fourth habitual offender, MCL 769.12. Defendant's criminal record reflects twenty felony convictions.

III. ANALYSIS

A. DEFENDANT'S CLAIM THAT HIS SENTENCE WAS DISPROPORTIONATE

Defendant first contends that the trial court abused its discretion in sentencing him because the sentences were not individualized and were not tailored to fit the offenses and the offender.² The standard of review for a sentence imposed by the trial court under the habitual offender statute is whether the trial court abused its discretion. *People v Reynolds*, 240 Mich App 250, 252; 611 NW2d 316 (2000). A sentencing court abuses its discretion when it violates the principle of proportionality, which dictates that a sentence must be proportionate to the seriousness of the crime and the defendant's prior record. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990).

² The crime occurred in April 1998; therefore, the new statutory guidelines do not apply, and the judicial guidelines control. MCL 769.34(1) and (2).

Defendant was sentenced as an habitual offender. The judicial sentencing guidelines do not apply to habitual offenders and may not be considered on appeal in determining an appropriate sentence. *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). Therefore, the trial court was authorized to sentence defendant as an habitual offender and to refuse to consider the judicial sentencing guidelines.

When an habitual offender's underlying felony and criminal history demonstrates that he is unable to conform his conduct to the law, a sentence within the statutory limits is proportionate. *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997).

The essence of defendant's argument on appeal is that his mental illness caused his past criminal behavior. In particular, defendant asserts that he was recently diagnosed with bi-polar disorder, and since taking medication, defendant's behavior is normal; therefore, there is no reason to severely punish defendant. Defendant also argues, in support of his proportionality argument, that he never pointed the gun directly at the victims and kept it pointed down, he never fired his weapon, the IGA received its money back, and that defendant was the only one who was injured, suffering multiple gunshot wounds.

We find defendant's arguments to be without merit. First, defendant presents no valid explanation, rationalization, or psychiatric support for his position that bi-polar disorder can cause and did cause criminal behavior during either periods of mania or depression. Second, based on review of the record, defendant inaccurately claims that he kept his gun pointed down while robbing the victims. In fact, one of the victims testified that she felt the barrel of the gun against her back. Third, we note that the sentence was within the guidelines range of ten to twenty-five years and not even at the far upper end of the range. Fourth, we fail to see how the gunshot wounds suffered by defendant constitute a reason to reduce defendant's sentence, where defendant's action in pointing his firearm at officers forced the officers to respond accordingly. Finally, based on defendant's extensive criminal history, now totaling twenty felonies, it is clear that he is unable to conform his conduct to the law, and the sentence was within the statutory limits. The trial court did not abuse its discretion in sentencing defendant.

B. DEFENDANT'S CLAIM THAT HE WAS DENIED HIS RIGHT TO A SPEEDY TRIAL AND EFFECTIVE ASSISTANCE OF COUNSEL

The right to a speedy trial is guaranteed to criminal defendants by the federal and Michigan constitutions as well as by statute. US Const, Am VI; Const 1963, art 1, sec 20, MCL 768.1; *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999). The guarantee applies to all criminal prosecutions. *People v Tracy*, 186 Mich App 171, 177; 463 NW2d 457 (1990). A formal charge or restraint of the defendant is generally necessary to invoke the speedy trial guarantees. *People v Rosengren*, 159 Mich App 492, 506 n 16; 407 NW2d 391 (1987).

In determining whether a defendant has been denied a speedy trial, four factors must be balanced: (1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) prejudice to the defendant from the delay. *People v Hill*, 402 Mich 272, 283; 262 NW2d 641 (1978); *People v Mackle*, 241 Mich App 583, 602; 617 NW2d 339 (2000).

A delay of six months is necessary to trigger an investigation into a claim that a defendant has been denied a speedy trial. *People v O'Quinn*, 185 Mich App 40, 47-48; 460 NW2d 264 (1990). The defendant must prove prejudice when the delay is under 18 months. *People v Collins*, 388 Mich 680, 695; 202 NW2d 769 (1972); *Cain, supra* at 112. A delay of more than 18 months is presumptively prejudicial to the defendant, and shifts the burden of proving lack of prejudice to the prosecutor. *Cain, supra* at 112.

In assessing the reasons for the delays, each period of delay is examined and attributed to the prosecutor or the defendant. *People v Ross*, 145 Mich App 483, 491; 378 NW2d 517 (1985). Unexplained delays are attributed to the prosecutor. *Id.* Scheduling delays and delays caused by the court system are also attributed to the prosecutor, but should be given a neutral tint and only minimal weight. *People v Gilmore*, 222 Mich App 442, 460; 564 NW2d 158 (1997). Delays caused by the adjudication of defense motions are attributable to the defendant. *Id.* at 461.

The defendant's failure to promptly assert his right to a speedy trial weighs against his subsequent claim that he was denied the right. *Rosengren, supra* at 508. A defendant can experience two types of prejudice while awaiting trial. *Gilmore, supra* at 461-462. Prejudice to the person results when pretrial incarceration deprives an accused of many civil liberties, and prejudice to the defense occurs when the defense might be prejudiced by the delay. *People v Ovegian*, 106 Mich App 279, 284-285; 307 NW2d 472 (1981). Prejudice to the defense is the more crucial in assessing a speedy trial claim. *Id.*

To preserve a speedy trial issue for appeal, a defendant must make a formal demand for a speedy trial on the record. *Cain, supra* at 111. Determination whether a defendant was denied a speedy trial is a mixed question of fact and law. *Gilmore, supra* at 459. The factual findings are reviewed for clear error, while the constitutional issue is a question of law subject to de novo review. *Id.*

Here, defendant argues that there were numerous delays attributable to the prosecutor, which effectively denied defendant's right to a speedy trial. However, a review of the record clearly indicates that the vast majority of the delays were directly attributable to actions and requests of defendant. In fact, the prosecutor was set to try the case in May of 1999, almost within a year of the crime, but defense counsel sought additional time to prepare, and then defendant requested a remand to the district court for a preliminary examination after initially waiving the examination, which further delayed the trial. Even at the time of trial, defendant sought and obtained an adjournment to gather more evidence. Moreover, in light of the facts of this case and overwhelming evidence of defendant's guilt, we see no prejudice to defendant from any delays.

Finally, we reject defendant's claim of ineffective assistance of counsel. A defendant must show that actual prejudice resulted from counsel's ineffectiveness – that is, had his counsel not erred, there existed a reasonable probability that the result of his trial would have been different. *People v Murray*, 234 Mich App 46, 65; 593 NW2d 690 (1999). Here, defendant argues a multitude of alleged shortcomings by counsel, including failure to timely raise speedy trial issues; however, once again, based on the overwhelming evidence of defendant's guilt, we find that no prejudice occurred even had counsel's actions been deficient. Moreover, regarding

the speedy trial – ineffective counsel claim, counsel is not ineffective for failing to make a frivolous or meritless motion. *People v Knapp*, 244 Mich App 361, 386; 624 NW2d 227 (2001).

Affirmed.

/s/ William B. Murphy

/s/ Kathleen Jansen

/s/ Kirsten Frank Kelly